

Hastings Law Journal

Volume 72 | Issue 4

Article 7

4-2021

Introduction: Students' Solutions to a Super Wicked Problem

David Takacs

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

David Takacs, *Introduction: Students' Solutions to a Super Wicked Problem*, 72 HASTINGS L.J. 1275 (2021).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol72/iss4/7

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Notes

Introduction: Students' Solutions to a Super Wicked Problem

DAVID TAKACS[†]

Climate change presents us with a “super wicked problem,” one that defies easy (or any) resolutions because of the complexity and number of interdependent causes, the high stakes for those who would have to pay for solutions, and the difficulties of predicting how and when and with what gravity its impacts will be felt.¹ Writing in *Massachusetts v. Environmental Protection Agency*, the United States’ most important climate change case, Justice John Paul Stevens declares that executive branch agencies “do not generally resolve massive problems in one fell swoop, but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed.”² In this *Hastings Law Journal* collection of three excellent Notes, Kelly Carson, Tyler Runsten, and Tori Timmons use their legal skills to “whittle away” at the “massive problem” of climate change. While all three start by acknowledging the super wicked problem climate change presents, each proceeds to present a set of constructive, feasible, analytically rigorous solutions to one aspect of the problem.

Kelly Carson notes that as global warming causes oceans to warm and expand and glaciers and ice sheets to melt, *The Water Is Coming*.³ Chronic flooding, invasive storm surges, and (in the far North) melting, sinking tundra means more and more currently inhabited places will become uninhabitable. As many as thirteen million Americans in over 400 towns and cities might be

[†] Professor of Law, University of California, Hastings College of the Law, San Francisco. LL.M., University of London, School of Oriental & African Studies; J.D., University of California, Hastings College of the Law; B.S. (Biology), M.A. (History & Philosophy of Science, & Ph.D. (Science & Technology Studies, Cornell University. Email: takacsd@uchastings.edu.

1. See e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159–60 (2009).

2. *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 499 (2007) (citations omitted).

3. Kelly Carson, Note, *The Water Is Coming: How Policies for Internally Displaced Persons Can Shape the U.S. Response to Sea Level Rise and the Redistribution of the American Population*, 72 HASTINGS L.J. 1279 (2021).

displaced by global warming-induced sea level rise by 2100; already coastal communities in both Louisiana and Alaska require relocation because they are no longer habitable.⁴ The Louisianan Native American island community of Isle de Jean Charles—“connected to the mainland by a single, frequently flooded road, has seen a ninety-eight percent loss of land since 1955”—is now attempting to relocate, as are numerous Alaskan indigenous communities.⁵

Kelly notes that for all of this, we are totally unprepared. The U.S. government does respond—fitfully, sometimes competently—to immediate disasters. Part of the problem with climate change is that because it is a slow-moving, unpredictable disaster, we don’t count it as a “disaster.” Nonetheless, it is a disaster we could prevent, and we could plan for the ravages we can no longer prevent. The United States simply has neither sufficiently mitigated its own greenhouse gas (GHG) pollution, nor devised a strategy, rooted in the law, to help environmentally displaced persons (or anyone else, for that matter) adapt within our borders. As Kelly’s Note details, necessary strategies must serve the needs of both the communities that will be uninhabitable, as well as the ones who will host the new migrants. And, as Kelly warns, the government is unlikely to spend the trillions of dollars needed to buy out endangered communities, and infrastructure like seawalls present merely temporary, imperfect solutions.

To avoid this unfolding catastrophe, Kelly suggests turning to the *United Nations Guiding Principles on Internal Displacement* and the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* for principles that could scaffold a framework for a government response.⁶ She suggests a funding mechanism to pay for the needed relocations and a reporting mechanism for keeping track of who most needs and who receives assistance in finding new homes.⁷ The main take home messages from Kelly’s Note are that climate change disaster relocation is not going to be easy and not going to be cheap but will be a lot easier and cheaper if we plan for the inevitable in a coordinated, equitable, proactive manner.

Coordinating U.S. responses to climate change ought to be a federal priority; unfortunately, that federal action has been woefully inadequate. While we might wish for (currently lacking) federal legislation to coordinate and tackle rising GHG emissions and to help communities adapt, states and local governments have been active in filling the gap left by federal inaction.

But as Tyler Runsten points out in *Climate Change Regulation, Preemption, and the Dormant Commerce Clause*, when states take actions to fill in the gaps that the federal government ought to be filling, ironically, constitutional conflicts may arise.⁸ In his Note, Tyler analyzes where such

4. *Id.* at 1283–84.

5. *Id.* at 1283.

6. *Id.* at 1301–04.

7. *Id.* at 1304–09.

8. Tyler Runsten, Note, *Climate Change Regulation, Preemption, and the Dormant Commerce Clause*, 72 HASTINGS L.J. 1313 (2021).

clashes between federal and state jurisdictions have played out in the courts and how states wishing to enact proactive laws on climate change can avoid constitutional pitfalls.

Tyler first points out ways that state climate change laws have avoided, and can continue to avoid, preemption challenges where federal regulations are designed to displace similar regulations that states attempt to implement. After showing how California and other states have avoided preemption when regulating GHGs as pollutants, Tyler surmises that our current conservative Supreme Court, with its shift towards states' rights, might further allow states to craft their own laws to mitigate GHG emissions and adapt to climate change.

The Dormant Commerce Clause also threatens climate change-proactive states. The Dormant Commerce Clause prevents against state laws that would inhibit the free flow of interstate commerce.⁹ Tyler details how California's aggressive climate change laws have been challenged as impeding interstate commerce.¹⁰ Nonetheless, California's laws and implementing regulations have survived such court challenges, which provide lessons for other states moving forward with their own climate change laws. States must make it clear that such laws are necessary to protect their own citizens and environmental resources. And states must craft laws that do not discriminate against out-of-state entities, that is, any markets that states create should welcome and encourage competition from within and outside the state.

Underlying Tyler's Note is an irony: while the problem of climate change is quintessentially global, with individual nations needing to take leadership, in our own nation, states and local entities have been forced to take up the cudgels. Courts may be right in opining that regulating greenhouse gases should be a quintessentially federal task. But if the nation doesn't rise to the challenge and, as Tyler points out, states are trying to protect their own resources, perhaps this existential crisis permits for leniency with respect to preemption and the Dormant Commerce Clause. In his dissent to *Massachusetts v. Environmental Protection Agency*, Chief Justice John Roberts mocks the majority's holding that the States have standing to challenge EPA's lack of greenhouse gas regulation: "No matter, the Court reasons, because *any* decrease in domestic emissions will 'slow the pace of global emissions increases, no matter what happens elsewhere.' Every little bit helps, so Massachusetts can sue over any little bit."¹¹ In this super wicked problem to which everyone contributes, every little reduction *does* help, and California's "ambitious goal" of being carbon neutral by 2045 is a gift to the planet, which Tyler argues courts should allow the state to keep on giving.¹²

9. See, e.g., *Or. Waste Sys., Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 98 (1994); see also Runsten, *supra* note 8, at 1330–31.

10. Runsten, *supra* note 8, at 1334–37.

11. *Massachusetts*, 549 U.S. at 546 (citation omitted).

12. Runsten, *supra* note 8, at 1317.

Speaking of gifts, only a Scrooge (like this author) would point out that our foremost season of gift giving, also known as Christmas, means rampant consumerism. Manufacturing, packaging, shipping, and disposing of every one of those gifts releases pounds of GHGs into the atmosphere. The December holidays present a climate change nightmare.

Fortunately, not all of us harbor similar misanthropic impulses. In *All I Want for Christmas Is a Carbon Sink*, Tori Timmons reminds us that “there is something magical about Christmas and its concomitant possibilities of peace, love, and forgiveness. During the holiday season, people are often kinder to each other. Media is filled with joyful messages that make people feel more generous and nostalgic.”¹³ Tori turns her analytical gaze away from governments and toward markets and consumer choice and conscience. Climate change is the ultimate collective action problem: We all cause it, we all will be affected by it, and we all must play a part in solving the problems it will cause. And we can help solve it by making more environmentally enlightened choices when buying stuff.

As Tori points out, Americans in 2019 spent over \$2 billion on “real” Christmas trees.¹⁴ What if part of the proceeds went to save the planet? Tori reviews how Christmas trees are produced, and the environmental havoc they may wreak on their way to harboring tinsel and sheltering gifts. (She does not address tinsel production: that exegesis awaits a future *Hastings Law Journal* author.) Tori details how Christmas trees grown so that they help the soil sequester carbon, reduce use of oil-based fertilizers, and employ other environmentally sensitive techniques can perhaps be eligible for carbon offset credits, or may simply be sold to consumers looking for trees that exact less of a toll upon the planet. Tori proposes detailed regulatory regimes for encouraging and monitoring climate-friendly Christmas trees. Tori concludes: “The sentimental warmth people feel from doing good for the planet is also notable. Because humans act based on tradition and habit, adapting American traditions to be more sustainable will result in purposeful, consistent action. That action can ultimately power the changes needed to mitigate climate change.”¹⁵

I hope these rigorous, creative, disparate, constructive analyses of climate change remedies inspire other law students and lawyers to contribute to solving the most pressing, super wicked problem of our times.

13. Tori Timmons, Note, *All I Want for Christmas Is a Carbon Sink*, 72 HASTINGS L.J. 1347, 1383 (2021) (footnotes omitted).

14. *Id.* at 1352.

15. *Id.* at 1384 (footnotes omitted).